BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD J. BONHAM	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,215
FARRAR CORPORATION	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the April 23, 2008, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleges he sustained repetitive trauma to his low back while working for respondent from July through December 2007. In the April 23, 2008, Order, Judge Barnes agreed and awarded claimant both medical benefits and temporary total disability benefits.

Respondent contends Judge Barnes erred. Respondent argues claimant injured his back in January 2006 and, therefore, the claim for workers compensation benefits, which claimant provided respondent in January 2008, was not timely. Moreover, respondent denies that claimant either injured or aggravated his low back during the period alleged. Respondent relies upon the opinion of Dr. Kris Lewonowski, who performed surgery on claimant's low back in December 2006. Respondent argued, in part:

> Dr. Lewonowski offers credible evidence that claimant did not sustain a repetitive trauma injury as a result of his working for respondent between July 2007 and December 2007. Specifically, Dr. Lewonowski stated that "claimant has an unstable spine due to grade II spondylolisthesis which was not caused by any work activities and is unrelated to work." Dr. Lewonowski also advised that to the extent claimant's condition was aggravated by his work activities, "the only aggravation was in terms of pain complaints which did not impact his need for ongoing treatment or the potential need for future surgery. Specifically, if claimant worked a sedentary

> job, he would still need treatment." Dr. Lewonowski also confirmed for claimant that claimant's work could not have caused the problems he was having with his back, including the broken screw in his back.[1]

In short, respondent requests the Board to deny claimant's request for benefits.

Conversely, claimant argues the work he performed from July through December 2007 not only increased his low back pain but also broke a screw in his back from an earlier surgery. Claimant's argument may be summarized as follows:

> Regardless of the extent of claimant's pre-existing conditions, the work he performed for the respondent from July through December of 2007 permanently aggravated and accelerated his underlying condition. This certainly must be true since the work performed during that time broke a screw in the claimant's back which was previously properly in place as evidenced by x-rays in July of 2007. In addition, Drs. Brown and Munhall also conclude that the claimant's work for the respondent from July through December of 2007 caused the claimant's current complaints and conditions.
>
> Written claim was timely filed on the respondent within the requisite time frame. The parties agree the written claim was filed in January of 2008 less than one month from the time of claimant's last date of injurious exposure in December of 2007.[2]

Consequently, claimant requests the Board to affirm the preliminary hearing Order.

Although respondent raises timely written claim as the principal issue to be decided on this appeal, the parties recognize that issue also raises the question of whether claimant either injured or aggravated his back working for respondent during the period from July through December 2007 as alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds:

Respondent operates a foundry. In 2003, claimant began working as a laborer for respondent, where he would use a sledgehammer to knock castings out of molds and grind castings. After approximately six months, respondent promoted claimant to parts

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[1] Respondent's Brief at 10, 11 (filed May 27, 2008).

[2] Claimant's Brief at 5, 6 (filed June 18, 2008).

inspector. Despite the promotion, claimant filled in for absent workers and, therefore, continued to perform the duties of a laborer.

In January 2006, claimant experienced back pain after bending over to pick up a part. Claimant began receiving medical treatment which resulted in claimant consulting with orthopedic surgeon Dr. Kris Lewonowski. In December 2006, Dr. Lewonowski fused claimant's low back. Claimant did not initiate a claim for workers compensation benefits for that injury.

After recovering from his low back surgery, claimant returned to work for respondent in April 2007. Claimant initially performed light duty activities such as hand grinding and gauging parts. Nevertheless, that work required repetitive bending and twisting. After experiencing some popping and pain in his back, in late June 2007 claimant returned to Dr. Lewonowski. The doctor prescribed physical therapy. But claimant could not afford the treatment. The doctor also ordered x-rays of claimant's back. Those studies showed no abnormalities.

Claimant continued to work for respondent but over time his symptoms increased, which claimant attributed to the grinders that vibrated his hips. Claimant's testimony is uncontradicted that he reported these problems to both his supervisor and respondent's safety advisor. Moreover, in July 2007 claimant began performing heavier work.

In November 2007, because he was still in pain, claimant consulted with Dr. Rasmussen, who practices with claimant's family care physician. Dr. Rasmussen referred claimant back to Dr. Lewonowski. Moreover, Dr. Rasmussen had reservations about claimant's job at the foundry. Claimant testified, in part:

> Q (Mr. Farris) It indicates that they are referring you to Dr. Lewonowski, is that consistent with your recollection?
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> A. (Claimant) Yes.
>
> Q. It also says that the patient's work environment is not compatible with his back problems and he is aware of this. Did you discuss your work environment and your back problems with Dr. Rasmussen?
>
> A. Yes.
>
> Q. What did you tell Dr. Rasmussen?

> A. That my work environment was swinging a sledgehammer for up to five hours a day, that I was receiving excessive vibrations to my hips from stand grinding and standing for ten hours a day.[3]

Consequently, claimant returned to Dr. Lewonowski on December 10, 2007. The doctor found claimant had possible radiculopathy and, consequently, ordered more x-rays of claimant's low back. This time the studies showed a broken screw at one of the levels where the doctor had fused claimant's back.

Claimant contends that on December 13, 2007, respondent placed him off work after telling him he would need a medical release that would permit him to perform all of the work duties in his department. Conversely, respondent contends it did not suspend claimant from work but merely requested him to obtain specific medical restrictions from the doctor. Nonetheless, due to the doctor's schedule, claimant was unable to return to Dr. Lewonowski until February 2008. In March 2008, Dr. Lewonowski restricted claimant from lifting over 40 pounds and limited his twisting, turning and bending. Claimant testified at the April 8, 2008, preliminary hearing that he returned to work for respondent on April 1, 2008, and was performing hand grinding.

Meanwhile, on January 4, 2008, at his attorney's request claimant was evaluated by Dr. Michael H. Munhall, who felt that claimant should not be working until he had undergone additional medical treatment. Moreover, Dr. Munhall felt the work claimant performed for respondent from July through December 2007 aggravated his low back pain. And on April 7, 2008, again at his attorney's request, claimant was evaluated by Dr. C. Reiff Brown, who found that claimant's present condition was related to the work he performed from July through December 13, 2007. The doctor concluded, in part:

> This young man with preexisting spondylolisthesis was apparently in stable condition until he started the heavy work activity in the iron foundry in 2003. He became increasingly symptomatic until the latter part of 2006 when his symptoms became so severe that the operative procedure was required. He did well post-operatively and remained symptom free. Dr. Lewonowski's follow-up radiographic data in the office indicates that the fusion became solid and this man was able to go back to light work activity without any significant pain 4 months post-operatively. The restrictions were lifted after which he went back to grinding in July 2007. The progressive increase in his back symptoms between July and December 2007 no doubt was caused by the heavy work activity that he was doing. Dr. Lewonowski

[3] P.H. Trans. at 19.

> did find the broken screw however his CT scan, routine x-rays and bone scan fails to reveal evidence of a failure of the spinal fusion.[4]

To counter the opinions of Dr. Munhall and Dr. Brown, respondent presented Dr. Lewonowski's opinion. According to Dr. Lewonowski, claimant's work may have aggravated the pain in his back but it did not impact his need for ongoing medical treatment or the potential need for future surgery.[5]

Claimant has been diagnosed with both spina bifida occulta and spondylolisthesis. He does not contend his work caused either condition. But he does contend his work aggravated his low back to such extent that he now requires medical treatment.

An injury is compensable under the Workers Compensation Act even when an accident at work only serves to aggravate a preexisting condition.[6] The test is not whether the accident caused a condition but, instead, whether the accident aggravated or accelerated a preexisting condition.[7] And at this juncture it is not relevant whether any such aggravation is temporary or permanent.

The opinions from Dr. Munhall and Dr. Brown are persuasive that claimant's work between July and December 2007 has aggravated his low back. Dr. Lewonowski's opinion that claimant may have aggravated the pain in his back but that the increased pain would not impact his need for ongoing medical treatment is less than credible.

The undersigned affirms Judge Barnes' finding that it is more probably true than not that the work claimant performed for respondent from July through December 13, 2007, aggravated claimant's back. And the undersigned further finds the medical treatment claimant presently needs as recommended by Dr. Munhall and Dr. Brown is directly related to that aggravation.

Finally, as claimant sustained a repetitive trauma injury from July through December 13, 2007, the January 2008 written claim that respondent received is timely as it was served upon respondent within 200 days of the injury.[8] This is true whether the date

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[4] *Id.*, Cl. Ex. 1 at 2.

[5] *Id.*, Resp. Ex. 1.

[6] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[8] See K.S.A. 44-520a.

of accident for this repetitive trauma injury is the last day of work or a later date as dictated by K.S.A. 2007 Supp. 44-508(d). Accordingly, the April 23, 2008, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the April 23, 2008, preliminary hearing Order entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[9] K.S.A. 44-534a.